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WATERS: AMERICAN LAW AND FRENCH AUTHORITY

I

THIS paper outlines the history of a branch of the law, and advances the belief that in this instance one nation has given the law to the others. It advocates the value to-day of consulting French sources upon the law of watercourses.

At the beginning of the nineteenth century the law of watercourses in England was represented by the declaration of Blackstone that the first appropriator of a watercourse "hath by the first occupancy, acquired a property in the current," [1] and by similar judicial declarations, continuing as late as 1831, when the Chief Justice of the Common Pleas ruled: "By the law of *England*, the person who first appropriates any part of the water flowing through his own land to his own use, has the right to the use of so much as he thus appropriates, against any other." [2] "It all depends upon the priority of occupancy," was the declaration of the period in England.[3]

[1] 2 BLACKSTONE, 403.

[2] Liggins *v.* Inge, 7 Bing. 682, 693, 5 Moo. & P. 712, 9 L. J. C. P. (o. s.) 202, 131 Eng. Reprint, 263 (1831).

[3] In Bealey *v.* Shaw, 2 Smith, 321, 330, 6 East, 208, 102 Eng. Reprint, 1266 (1805), Lawrence, J., said: "It all depends upon the priority of occupancy." Le Blanc, J., said that the first to erect a mill might take all. In Canham *v.* Fisk, 2 Cromp. & J. 126 (also 2 Tyrw. 155), 149 Eng. Reprint, 53 (1831), Bayley, B., said: "There is a fourth mode of acquiring such a right, *viz.*, by appropriation. If a man find water running through his land, he may appropriate it, and thus acquire a title to the water."

Blackstone died in 1780. The year 1804 was the year of promulgation of the Code Napoléon, the French Civil Code. Its doctrine of the law of watercourses differs from the doctrine of Blackstone and the English law of prior appropriation then prevailing. In articles 644 and 645 the Code Napoléon enacted:

"*He whose property borders on a running watercourse,* other than that which is declared an appurtenance of the public domain by article 538, under the title of the Classification of Things, may supply himself from it in its passage for the irrigation of his properties. He whose estate such water crosses is at liberty to use it within the space which it crosses, *but on condition of restoring it, at its departure from his land, to its ordinary course.*" [4]

"If a dispute arises between the proprietors to whom these waters may be of use, the courts, in giving judgment, should reconcile the interest of agriculture with the consideration due to property rights; and in all cases special and local rules upon the flow and use of water should be observed." [5]

The limitation confining water rights to the bordering landowners, and the limitation requiring of them restoration to its ordinary course (the essential points of the modern common law), are present; the allowance of special right to an appropriator prior in time (the essential of the English rulings above noted) is negatived by those limitations.

Things French in 1804 were welcome in America. England was an enemy but recently fought off, while France was a friend who had given aid, and in the following period when most of the American law was beginning to be made, French authorities were sympathetically used in America. Some states passed statutes forbidding English authorities to be cited.[6] The use of civil law authorities in the hands of others was usually ineffective for

[4] "Art. 644 — Celui dont la propriété borde une eau courante, autre que celle qui est déclarée dépendance du domaine public par l'article 538, au titre *de la distinction des biens*, peut s'en servir à son passage pour l'irrigation de ses propriétés. Celui dont cette eau traverse l'héritage peut même en user dans l'intervalle qu'elle y parcourt, mais à la charge de la rendre, à la sortie de ses fonds, à son cours ordinaire."

[5] "Art. 645 — S'il s'élève une contestation entre les propriétaires auxquels ces eaux peuvent être utiles, les tribunaux, en prononçant, doivent concilier l'intérêt de l'agriculture avec le respect dû à la propriété; et, dans tous les cas, les règlements particuliers et locaux sur le cours et l'usage des eaux, doivent être observés."

[6] GRAY, NATURE AND SOURCES OF THE LAW, 323; Pound, in 3 ILL. L. REV. 354.

permanent influence upon the law, but in many branches it became very effective for that purpose in the hands of Kent and Story.[7]

This disposition of Story and Kent to incorporate civil law into the common law has been frequently noted. Story remarked on one occasion: "We really are sadly ignorant of the vast resources of the Roman, the French, and the other foreign laws, which may be brought in aid of our common law studies."[8] And his biographer records of him that

"in all of his works he has introduced them, (the civil law principles) in illustration or contradiction of the common law, giving the preference often to the former. I cannot but think that his works have tended greatly to determine the attention of the profession in this country towards the continental jurisprudence, and that much credit is due to him in pioneering the way, and recommending the advantages of its systems, as well as for the adoption of many of its principles into our jurisprudence."[9]

Kent's words bear the same testimony for his own case:

"When I came to the bench there were no reports or State precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was. . . . I made much use of the *Corpus Juris*, & as the Judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my Brethern to rout & carry my point by mysterious want of French & civil law. The Judges were republicans & very kindly disposed to everything that was French, & this enabled me, without exciting any alarm or jealousy, to make free use of such authorities & thereby enrich our commercial law."[10]

"I read a great deal in Pothier's works and always consulted him when applicable."[11]

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[7] "But very few American judges and lawyers who would have liked to make use of the civil law were able to do so effectively. Kent and Story practically stood alone." See "The Place of Judge Story in the Making of American Law," by Roscoe Pound, 48 AM. L. REV. 676, 688; also same article with fuller citations, 3 ILL. L. REV. 354. See also "The Value and Place of Roman Law in the Technical Curriculum," by Charles Sumner Lobingier, 49 AM. L. REV. 349. Likewise 34 L. QUART. REV. 82, 97, citing other papers commenting upon the influence of civil law in America.

[8] 2 LIFE AND LETTERS OF JOSEPH STORY, 414.

[9] *Ibid.*, 571, 572.

[10] From a letter of Chancellor Kent, dated October 6, 1828, published in 9 GREENBAG, 206, 209, and 17 YALE L. J. 559.

[11] Kent, letter published in 9 GREENBAG, 206, 210.

The biography of Story shows that mutual high regard existed between the two, and each followed with close attention the work of the other, and in rounding out the common law with civil law principles there was a measure of friendly rivalry between them.

While the English courts were laying down Blackstone's rule of prior appropriation as the law of England, America had been dealing with the question through the studies of Story, Kent, and Angell. In 1827 Story rendered an opinion in *Tyler* v. *Wilkinson* [12] which is a classic in this branch of the law, and the first expression, so far as considerable research of the present writer has disclosed, of the familiar notation of "riparian" in reference to rights in watercourses.

We find no specific authority mentioned by Story for using the term, for he says, "I shall not attempt to examine the cases at large," and, "I have, however, read over all the cases on this subject which are cited at the bar or which are to be found in Mr. Angell's valuable work on Watercourses, or which my own auxiliary researches have enabled me to reach." This sends us to Angell, but examination of Angell's work shows that it was not from there that Story got the suggestion of the term. Angell had not yet used it himself. Nor is it used in any of the cases which Angell's first edition (1824) gives, nor in any case at that time contained in the American or English reports. But Angell's testimony here is interesting nevertheless. His first edition was the only one issued at the time of Story's opinion. In its preface the author says that Justice Story had given advice in preparing the book. For this Angell thanks him as "one whose distinguished talents and profound knowledge of the law have made him an ornament and a blessing to his country." It is not surprising to find Story, in this opinion three years later, commending "Mr. Angell's valuable work." When, in 1833, Angell issued a second edition, the word "riparian" now for the first time appeared in it. He makes special comment upon it as follows: "Those who own the land bounding upon a watercourse are denominated *by the civilians* riparian proprietors, and the same convenient term *was adopted by Mr. J. Story* in giving his opinion in the case of Tyler *v.* Wilkinson." In his still later editions Angell finds it possible simply to say in that place, "The same significant and convenient term is now fully introduced into the common law "

[12] 4 Mason, 397, Fed. Cas. No. 14, 312 (1827).

deeming it unnecessary to vouch Story for it, the term being so fully introduced by that time.

According to this intimate evidence thus furnished, the introduction of the name "riparian" into the rights to waters at common law is due to this opinion of Story, who, in turn, took it from the "civilians" and not from the common law. In what civil law authorities Story found it we have no mention either by himself or by Angell. The doctrine of Story's opinion is sufficiently exemplified by such expressions as: "The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself," and "There may be, and there must be allowed *to all*, of that which is common, a reasonable use," and "It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy." A construction for this as a following of English law of the period is difficult; while, on the contrary, connection with the opposing civil law is indicated by its similarity to the latter, reinforced by the testimony of Angell.

With a difference of but a year in publication is the equally classical exposition of the common law of watercourses by Kent. The third volume of his Commentaries, in which waters are treated, was issued in 1828. The subject of watercourses coming as it does, in Kent's third volume,[13] Story's opinion has precedence over Kent by a few months only, in point of time. The origin of Kent's contemporary use of the "riparian" notation, and of his exposition of the riparian doctrine, is not left to inference; it is explicitly stated by him.

Kent is found using in his Commentaries the words of the Code Napoléon,[14] and in elaborating upon them his leading citations are to the Code Napoléon, the Digest of Justinian, the Codex of Justinian, and the works of Pothier, of Toullier, and of Merlin.[15]

His text is an unconcealed commentary upon the civil law, dis-

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[13] 3 KENT COMM., 353 *et seq.*

[14] "Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel where it leaves his estate" (3 Com. 12 ed., 439).

[15] 3 KENT COMM., 12 ed., 439, note c, citing at the end Code Civil (Napoléon), Arts. 641, 643, 644, and at the beginning citing DIGEST JUST., 39. 3.4.10, Code Just., lib. 3, t. 34, 1, 7; POTHIER, TRAITÉ DU CONTRAT DE SOCIÉTÉ, second App. Nos. 236, 237; TOULLIER, III, 88, note 133; MERLIN, REP. JURISP., tit. Cours d'Eau.

cussing the rule of Pothier and adopting "the just and equitable principle given in the Roman law"[16] at one place incorporating bodily a passage from the Roman Institutes,[17] and closing the exposition of the subject with the following note: "The Code Napoléon, n. 640, 641, 643, 644, establishes the same just rules in the use of running water," referring to the rules he has set forth in the text of his Commentaries.[18] The term, "riparian proprietor," with civil law and especially French references, comes in freely as an apt expression although none of the English or American decisions prior to his Commentaries, not even his own decisions, had brought it into the subject.

The same fact is made plain, not only in the riparian doctrine of watercourses, but in the doctrine of drainage of surface water. The investigations of Professor Pound disclose: "The common law as to surface water was formative during this period. A number of jurisdictions avowedly adopted the doctrines of the civil law. Most of them in so doing cited Kent. In his discussion of water rights, Kent [19] sets forth the doctrines of the civil law and cites Pothier, Toullier, the Digest and Code of Justinian, and the French civil code; and he states as the controlling principle the Roman maxim," etc.[20]

Kent cites Story's decision of the previous year as one "where

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[16] "Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.*" 3 KENT COMM., 354, 355 (1828).

[17] "The elements of air, light, and water, are the subjects of qualified property by occupancy; and Justinian, in his Institutes, (Inst. 2. 1.1., says, they are common by the law of nature." 2 KENT COMM., 1 ed., 281.

[18] 3 KENT COMM., 2 ed., 441, note c. In subsequent editions reference is added to the Code of Louisiana, Arts. 656, 657, which was framed upon the Code Napoléon at the time when Louisiana was a French colony.

[19] *Ibid.*, 439–441.

[20] The maxim cited is "*sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*" (Pound, in 3 ILL. L. REV., 354, 360). "Any one may improve his own land provided he does not do it in a way that makes his neighbor's land worse." See Ogburn *v.* Connor, 46 Cal. 346 (1873); McDaniel *v.* Cummings, 83 Cal. 515, 23 Pac. 795 (1890).

the whole law on the subject is stated with learning, precision and force," and it is fairly certain that the term "riparian" was received by Kent from Story's opinion.[21] But Kent went equally to the original French sources, and the influences of Story and Kent are interwoven, so it is impossible to give precedence to either.

II

From the foregoing it would appear that the line of descent of the modern common law of watercourses, known as the doctrine of riparian rights, might pass back through Kent and Story to the Code Napoléon. Some further attention to the law before Story and Kent will reinforce this conclusion.

The influence of the civil law is illustrated in Scotland and at a much earlier period, as Scotland had early in its history adopted the civil law system. The same year that *Shury* v. *Piggott* (noted below) was assimilating in England the law of watercourses to the law of ancient custom, a Scotch case (1625) was already laying down the riparian principle in its more familiar form, ruling that a man owning land upon a stream may protect it from diversion irrespective of whether he was using it, and saying: "For albeit he had no present use thereof, yet he might possibly find thereafter some use for the same."[22] The same is true of a still more explicit Scotch case[23] of a century and a half later, where the influence of the civil law is expressly acknowledged. But it has been pointed out that Scotch expressions seem to have passed unnoticed in English or American courts.[24]

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[21] 3 KENT COMM., 353–357 (1828). Kent cites Story's opinion several times, and always without reference other than "before Judge Story, Rhode Island Circuit, 1826." In Mason's Reports it is published as of the June term, 1827. Probably, therefore, it was decided in 1826, but not published until 1827, and Kent had received a copy of it from Story privately. Story's treatise on Conflict of Laws shows their mutual regard by bearing a dedication to Kent.

[22] Bannatyne *v.* Cranston, MORISON'S DICT. 12769 (1624). "Property."

[23] Magistrates of Linlithgow *c.* Elphinstone of Cumbernauld, 3 KAMES, 331 (1768).

[24] Lord Blackburn in Orr Ewing *v.* Colquhoun, L. R. 2 A. C. 839, 847, 14 S. L. R. 260 (1877).

Some other Scotch cases in Morison: About the year 1625 an action was allowed for diverting a stream, in which it was held sufficient simply to show that the diversion "turned a water property into a dry property." Citing *l. unica. Ne quis aquam de flumine publico.* Morison, 12770. In the year 1768, Kelso *v.* William, 12807 Morison's Dict., Counsel cites Roman law (L. 10, § ult. D. De aqu. et aqu. pluv.) as prohibiting diversion of *navigable* river, and L. 4. 7. C. De servit et aqu. as applying to "smaller

The condition of the American law before Kent and Story was one of undevelopment. The Connecticut cases were the earliest. Their only restriction was that the party diverting the stream must return the surplus after his use, but without restriction upon place of use, or upon the size of such surplus.[25] The term "riparian," whether in reference to claimants or lands or doctrine, made no appearance. There were a few more cases in Massachusetts than in Connecticut, but they left the matter in the same status as in Connecticut.[26] In New York a number of rulings[27] by Kent prior to his Commentaries were steps in development, but no riparian doctrine was adverted to in any of them, nor does the word "riparian" appear in any of them or in any connection. There was but one early American decision of possible significance, a decision of 1795 in New Jersey. This case, a charge to a jury, uses the expression "*Aqua currit et debet currere* is the language of the law" as "firmly settled."[28] The opinion was copied in paraphrases by Angell,[29] and its expression was adopted by Kent and is cited in the

runs of water." Lord Stair held *accord*, citing Bannatyne *v.* Cranston, etc. In the year 1804, Glenlee *v.* Gordon, 12834 Morison's Dict., is a clear statement of principles by counsel with citation of Roman and early Scotch authorities.

[25] Howard *v.* Mason, cited in 1 Root (Conn.), 537 (1783); Perkins *v.* Dow, 1 Root (Conn.), 535 (1793); Ingraham *v.* Hutchinson, 2 Conn. 584, 590 (1818) (per Swift, C. J.).

[26] The first reported case is Adams *v.* Frothingham, 3 Mass. 352 (1807), and dealt mainly with accretions to the bed. The subsequent cases tended to fix rights for irrigation by the extent of priority of appropriation. King *v.* King, 7 Mass. 496 (1811); Weston *v.* Alden, 8 Mass. 136 (1811); Hodges *v.* Raymond, 9 Mass. 316 (1812). These were then restricted so as to require the irrigator to return the surplus to the stream after his use, but did not otherwise lay down riparian restrictions. Colburn *v.* Richards, 13 Mass. 420 (1816): Cook *v.* Hull, 20 Mass. (3 Pick.) 269 (1825); Anthony *v.* Lapham, 22 Mass. (5 Pick.) 175 (1827). In none of these does the word "riparian" appear in any connection.

[27] Palmer *v.* Mulligan, 3 Caines (N. Y.), 307 (1805), (Kent, Chief Justice); Gardner *v.* Village of Newburgh, 2 Johns. Ch. (N. Y.) 162 (1816), (Kent, Chancellor); Van Bergen *v.* Van Bergen, 3 Johns. Ch. (N. Y.) 282 (1818), (Kent, Chancellor). These are the only water decisions by Kent shown by the index of Caines' Reports or Johnson's Chancery Reports.

[28] "In general it may be observed, when a man purchases a piece of land through which a natural watercourse flows, he has a right to make use of it in its natural state, but not to stop or divert it to the prejudice of another. *Aqua currit, et debet currere*, is the language of the law. . . . This principle lies at the bottom of all the cases which I have met with, and it is so perfectly reasonable in itself, and at the same time so firmly settled as a doctrine of the law, that it should never be abandoned or departed from." Merritt *v.* Parker, 1 Coxe (N. J.), 460, 463 (1795).

[29] ANGELL ON WATERCOURSES, 1 ed., 5 (1824).

opinion of Story. Their use of it is rather as a corroboration of conclusions reached by them from other sources. The antecedents of the New Jersey expression do not appear, but are later indicated in referring again to this maxim.

The English law which stood for prior appropriation in Blackstone's time was, previous to Blackstone, similarly undeveloped. The earliest cases usually presented a condition where one had from time immemorial used the water for a mill or for watering cattle, or for irrigating a meadow in time of drought,[30] and another wholly stopped the stream or diverted it elsewhere and left plaintiff's mill or land dry, whereupon the courts acted to protect the former's ancient enjoyment. In the Year Books several such cases appear,[31]

[30] *E. g.*, Y. B. 11 & 12 Edward III, Horwood's ed., 464 (A. D. 1338), where J. (James?) diverted the course of a certain stream of water from T. (Thomas?). The latter complains that water was wont to flow from a spring to his meadow, "with which water he was wont to water his cattle, namely, horses, sheep and cows, and also to fish therein and brew therewith, *and water (adaquare) the aforesaid meadow in time of drought*, and do other needful things therewith," that J. diverted the course of the stream, and that by the diversion T. suffered damage; and it was ordered "that the said nuisance be abated and that the said water be turned into its former course at the expense of the said J."

[31] See WOOLRYCH ON WATERS, p. 177.

Mr. Richard C. Harrison has kindly contributed the following in reference to water cases in the Year Books:

"The Year Books contain a number of cases relating to the diverting of a stream from its natural course. I would not venture any statement as to how many such cases there are, but I have an impression, based only upon somewhat desultory readings, that the cases predicated upon a deprivation of the use of water are less frequent than those predicated upon damage by a flooding of land, and also that among the cases of the former kind by far the greater number are cases in which the use of which the plaintiff had been deprived was in connection with a mill. In estimating the significance to be attributed to the number of cases relating to watercourses which may be found in the reports, whether the number be large or small, it should be remembered that many cases of that character would never come before any of the courts presided over by the royal judges, and therefore would not be reported at all, simply because, by reason of being of minor importance, they were relegated for adjustment to the sheriff or to the local courts (1 NICHOLS' BRITTON, 109a, 155b).

"In the period covered by the Year Books the common law courts recognized at least two different forms of action adapted to dealing with a diversion of water from a stream. First of all, there was an assise of nuisance *quare divertit cursum aquae*, which may be said to have been the normal remedy in such cases. No such form of action appears among the forms given by Glanville, but the book entitled 'Select Civil Pleas' (Volume III of the publications of the Selden Society) contains two cases of that kind, decided in 1201,—Blohicu *v.* Sonka, pl. 201, and Prior of Bodmin *v.* Thierry de Tregew, pl. 203. Similar cases occur in the ABBREVIATIO PLACITORUM, at pages 86, 120, 121, 206, 333. In the Year Books I have noted cases of that kind at 9 Ass. 19 (1335) and 32 Ass. 2 (1358). There are doubtless others. The case at Y. B. 11 & 12 Edw. III, 464, was

giving only arguments over the pleadings, without discussion of any principles of water law. Lord Coke, in his time, also has but a few mentions of waters, isolated and disconnected, such as, "The turning of the whole stream that runs to a mill is a disseisin of the mill itself."[32] No doctrine of waters of any kind appears in Coke, much less a "riparian doctrine."[33] Even the law dictionaries up to the

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such a case. Where the interest of the plaintiff in the land affected had been acquired by him after the commencement of the diversion, or where the person in possession of the land upon which the diverting was being done was not the one by whom the diversion had been commenced, the appropriate remedy, after the Statute of Westminster II had authorized a remedy in such cases, was an assise *quod permittat reducere cursum aquae*, in which the relief obtainable was merely a restoration of the stream to its former course. A case of that sort is reported at Y. B. 30 Edw. III, 3a, continued at 26a (1356), and another at Y. B. 2 Henry IV, 13a, pl. 55 (1400). After the invention of trespass on the case, that form of action, at least in theory, was an appropriate remedy in cases where no assise of any kind was maintainable because either the plaintiff or the defendant was not a freeholder. There are several *dicta* to that effect in the Year Books of the fifteenth century, but the earliest case so far as I know in which trespass on the case was actually maintained for a diversion resulting in a deprivation of the use of water is Sir Henry Grey's case, Y. B. 21 Henry VII. 30, pl. 5 (1505).

"While none of these forms of action are mentioned by Glanville, he gives the form of writ for an action counting upon damage caused by installing "*fossatum aliquod*" on property not in the possession of the plaintiff (Liber XIII, Cap. 35). Such an action was known as an assise *quare levavit fossatum*, or *de fosso levato*. *Fossatum* means anything produced by digging up the ground. It means a ditch as well as a dyke or embankment. Therefore in some cases this kind of assise was an alternative remedy available to one deprived of the use of water by a wrongful diversion. A case reported at Y. B. 16 Edw. III, 82–86 (Rolls ed.) (1304), seems to have been of that kind.

"In the earlier cases the form of judgment, when in favor of the plaintiff, was that he recover "his seisin." Obviously this did not refer to a seisin of any tangible property, as one might infer from the statement at Co. LITT. 161a. The wrong done by the diversion was regarded as a disseisin, not of tangible, but of incorporeal property, that is to say, an interference with the enjoyment of rights. This is quite explicitly stated by Britton (1 NICHOLS' BRITTON, 139a–141a). Glanvill also refers to a purpresture, not against the Crown, but against an individual, caused by the diverting of a stream from its natural course, as being a disseisin (Liber IX, Cap. 13). Such was the theory. In actual practice the usual form of judgment was much more specific, namely, that the stream be restored to its former course. Thus, in Raymond Bulb *v.* Roger de Cottelegh, Abbr. Pl. 120 (1244), the sheriff was commanded '*quod faciat praedictam aquam esse in recto cursu suo sicut prius fuit.*'

"I hope to have an opportunity in the near future to prepare a paper setting forth my own conclusions regarding what can be found in the early English authorities on the subject of water courses."

Richard C. Harrison.

[32] Co. LITT., 161.

[33] The sole noteworthy passage in Coke is that in which he includes "water" with land under the maxim "*Cujus est solum ejus est usque ad caelum et ad inferos*," a principle which England later accepted for *percolating water*. But that principle never took

nineteenth century do not show the word "riparian" as in use in connection with rights in running water.[34]

The principle of the English law of the time of Lord Coke and for a century later was to protect long-standing enjoyment of waters by assimilation to prescription or "custom," as the present writer has noted in a previous article.[35] The most important of these cases is *Shury* v. *Piggott*, decided in 1625. The case seems to have excited a good deal of attention at the time, being given in six different reports,[36] and has been said to have discussed collaterally many things which were not necessary to the decision.[37] The case discussed the matter from the point of view of formal pleading, as was usually the way cases were treated at the time. The plaintiff declared, in the words of pleading on ancient "custom," that the water *currere solebat et consuevit* to his land, and one of the judges rested his decision on the ground that, as he said, "*consuevit* is a good word for a custom."[38]

So in the other cases of the time: "By reason of the words *consuevit et debuit*, it must be intended that a prescription was given in evidence."[39] "*Currere consuevit* had been held well enough in case of a watercourse, because that must *be time* immemorial."[40] "If I have a right from usage as *currere solebat*, I have the *right* in such manner as the *usage* has been."[41]

"Those cases are wherein the plaintiff declared, that the water *currere consuevit et debuisset* to the plaintiff's mill, time out of mind; which words

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hold of the law of running water or watercourses, as we hereafter note, nor did Coke attempt to erect a system of law upon it. Aside from the statement of the maxim, Coke is substantially silent.

[34] "Riparia (from *ripa*, a bank). In the Statute of Westm. 2 c. 47. Signifies the water or river running between the banks, be it salt or fresh. 2 *Inst. fol.* 478. The word occurs also in *Rot. Char.* 9 *E.* 2 *num.* 12. But in the common translation of *Magna Charta, cap.* 15, *Riparia* is rendered a bank or river. *Cowell, edit.* 1727." CUNNINGHAM'S LAW DICT. (1765). Repeated (paraphrased) in JACOB'S LAW DICT. (1797).

[35] 22 HARV. L. REV. 190, 195.

[36] Palm. 444; Poph. 166, 81 Eng. Reprint, 1163; 3 Buls. 339; Noy, 84; Latch. 153; W. Jones, 145, 81 Eng. Reprint, 280.

[37] Lord Blackburn in Dalton *v.* Angus, L. R. 6 A. C. 740, 825 (1881).

[38] As reported in Palm. 444, 81 Eng. Reprint, 1163, Dodderidge, J., in Shury *v.* Piggott, said, "Ici sont sufficient parols d'expresser un prescription, de temps dont, etc., consuevit currere," adding that, "serre entend ancient."

[39] Rosewell *v.* Prior, 1 Ld. Raym. 392, 91 Eng. Reprint, 1160, a case of lights.

[40] Powell, J., in Tenant *v.* Goldwin, 2 Ld. Raym. 1089, 1094, 92 Eng. Reprint, 222.

[41] Brown *v.* Best, 1 Wils. 174, 95 Eng. Reprint, 557 (1747).

are of the same significance as if he had shewed it to be an antient mill. . . . The word *solet* implies antiquity, . . . and it was the opinion of a learned Judge that the words *currere consuevit et solebat* did supply a prescription or custom."

The report says: "The word *solet* implies antiquity and will amount to a prescription."[42] The maxim *aqua currit et debet currere ut currere solebat* seems to be connected with these early rulings based upon prescription or ancient custom; a stage now, of course, discarded, although the maxim survives.[43]

Although there were casual expressions more resembling the modern law,[44] the modern doctrine was not laid down in England until the case of *Mason* v. *Hill*,[45] decided in 1833, where Lord Denman undertook "to discuss, and, as far as we are able, to settle the principle upon which rights of this nature depend."[46]

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[42] Palmer *v.* Keblethwaite, 3 Mod. 48, 51, 1 Show. 64, 89 Eng. Reprint, 451; Skin. 65, 90 Eng. Reprint, 31. In Masin *v.* Hill, 5 Barn. & Adol. 1, 110 Eng. Reprint, 692 (1833), Lord Denman speaks of these two reports of the case, and says: "The final result of that case does not appear in the books, and the roll has been searched for in vain," but the report of it on appeal appears in four different reports, *viz.*, Skin. 175, 90 Eng. Reprint, 81; Carth. 84, 90 Eng. Reprint, 653, 87 Eng. Reprint, 30; 3 Mod. 48, 90 Eng. Reprint, 901, and Holt, 5. See also 3 Lev. 133, 83 Eng. Reprint, 615.

[43] The maxim is referred to in Shury *v.* Piggott by Story in Webb *v.* Portland Mfg. Co., 3 Sumner, 189, 199 Fed. Cas. No. 17, 322 (1838).

[44] There is the following interesting passage in Britton: "Sometimes the soil is subject to a servitude by law, *although not by any man's appointment*, or by the establishment of peaceable seisin. . . . For the law forbids anyone . . . to make a ditch in his own soil whereby the water is diverted from his neighbour, *or whereby it is hindered from remaining in its ancient course.* . . . " BRITTON, Baldwin's ed. of NICHOLS' TRANSLATION, 289–290. The foregoing portion is extracted from the whole passage as given in BINGHAM, CASES ON WATER RIGHTS, 1. In Countess of Rutland *v.* Bowler, Palm. 290, 81 Eng. Reprint, 1087, plaintiff alleged that a watercourse "*soloit currere per modestum et incessantem cursum*" to a parcel of plaintiff's land where she had a mill. Defendant claimed that the declaration was bad for not alleging that it was an "ancient" mill, so as to found a prescriptive right to the watercourse. But it was held that it was the same whether the mill was new or old; it was enough that the water "used *sequer cest course. . . . Car ne poet user son terre, ou le water, qui passe par son terre, al damage d'auter*," and judgment was entered for the plaintiff. In 1805 Lord Ellenborough said: "The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have *the advantage* of a flow of water in his own land without diminution or alteration," and refers later on to this as his "natural right." Bealey *v.* Shaw, 6 East, 208, 102 Eng. Reprint, 1266 (1805). See also Wright *v.* Howard, 1 Sim. & St. 190, 57 Eng. Reprint, 76 (1823).

[45] 5 Barn. & Adol. 1, 16, 110 Eng. Reprint 692 (1833).

[46] Lord Blackburn in Orr Ewing *v.* Colquhoun, L. R. 2 A. C. 839, 854 (1877), says the modern law of riparian rights "can hardly be considered as settled law in *England*

This ruling was five or six years after the publication of the opinion by Story and the Commentaries by Kent. No mention is made, in *Mason* v. *Hill* or any previous English case, of the word "riparian" in connection with the subject, and neither court nor counsel cites either these American jurists or the French Code; but if the vogue of these sources then current be assumed of no influence upon the opinion the influence of the civil law is nevertheless shown. A long discussion of other civil law sources is part of the opinion.

In any event, until Story and Kent were resorted to by the English decisions in the following decade, the English law still wavered in spite of Lord Denman's effort. The Court of Exchequer, in 1839, distinguished *Mason* v. *Hill* as inapplicable (against the party producing it) to a flow of artificial origin;[47] while in 1843 percolating or underground water was also excepted from its operation.[48] The latter decision was made in the Court of Exchequer Chamber, where the judges of all these courts — Common Pleas, King's Bench, and Exchequer — sat together, and Chief Justice Tindal of the Common Pleas (who had decided for prior appropriation in *Liggins* v. *Inge*, *supra*, two years before *Mason* v. *Hill*), being again the writer of the opinion, intimated that he still held doubts of the foundation of the doctrine of *Mason* v. *Hill*. He intimates that the ground and origin of the doctrine is obscure, enumerating various possible explanations, "or it may not be unfitly treated, as laid down by Mr. Justice Story," etc. There was still this atmosphere of uncertainty when, in *Wood* v. *Waud* in 1849, the ruling in *Mason* v. *Hill* was reiterated

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before the case of *Mason* v. *Hill*, in 1833." In another case it is said: "Upon the second trial of Mason *v.* Hill, a special verdict was found, on the argument of which Lord Denman delivered an elaborate judgment which . . . has always been considered as settling the law as to the nature of the right." McGlone *v.* Smith, 22 L. R. Ir. 568 (1888). *Accord* as to the effect of Mason *v.* Hill, see Cocker *v.* Cowper, 5 Tyrw. 103 (1834); Embrey *v.* Owen, 6 Ex. 353, 20 L. J. Ex. 212, 155 Eng. Reprint 579 (1851); Stockport W. W. Co. *v.* Potter, 3 H. & C. 300, 323, 10 Jur. (N. S.) 1005, 159 Eng. Reprint, 545 (1864); Chasemore *v.* Richards, 7 H. L. Cas. 349, 11 Eng. Reprint, 140 (1859), Wightman, J.; Pugh *v.* Wheeler, 19 N. C. (2 Dev. & B.) 50 (1836), Ruffin, C. J.; GALE ON EASEMENTS, 8 ed. (1908), 258; ANGELL ON WATERCOURSES, 7 ed., § 133; SALMOND ON TORTS, 254.

[47] Arkwright *v.* Gell, 5 M. & W. 203, 151 Eng. Reprint, 87 (1839). In development of this doctrine, compare the present writer's paper in 29 HARV. L. REV. 137. See also the doubtful ruling in E. Clemens Horst Co. *v.* New Blue Point Co., 177 Cal. 631, 171 Pac. 417 (1918).

[48] Acton *v.* Blundell, 12 M. & W. 324, 152 Eng. Reprint, 1223 (1843).

by Chief Baron Pollock as having placed the cases for natural streams "upon their right footing." [49] The term "riparian" in reference to the subject occurs in *Wood* v. *Waud* for the first time (so far as we have discovered) in any English authority. As his main reliance, Chief Baron Pollock quotes Kent and Story. "The law is laid down by Chancellor Kent," he says (quoting Kent); "and Mr. Justice Story lays down the same law." [50] The next case, also in the Exchequer, was *Embrey* v. *Owen*,[51] in 1851, which has been widely cited. Baron Parke there adopts the use of the term and repeats the statement that the law of flowing water "is now put on its right footing." He cited "the very able judgment of the late Mr. Justice Story," [52] and a late edition of "Angell on Watercourses," and quotes at length from Kent's Commentaries.[53] No hesitancy appears in English decisions henceforth.[54]

Emphasis upon the way the English decisions bring up with Kent, Story, and thereby the French code, is furnished by the next important English ruling, which appeared in 1858. It was a Privy Council case, appealed from Canada, where French law had once prevailed. Counsel read from Story and Kent, and while the opinion cites no authority it commends counsel for having gone into the questions "with great learning and ingenuity." There occurs the following significant conclusion: "It does not appear that, for the purposes of this case, any material distinction exists between the French and the English law." [55]

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[49] Wood *v.* Waud, 3 Exch. 748, 154 Eng. Reprint, 1047 (1849). See the comment upon this leading case in E. Clemens Horst Co. *v.* New Blue Point Co., 177 Cal. 631, 171 Pac. 417 (1918).

[50] Quoting 3 KENT COMM., 2 ed., 439; Story in Tyler *v.* Wilkinson, 4 Mason, 397, Fed. Cas. No. 14, 312 (1827).

[51] 6 Exch. 353, 20 L. J. (N. S.) 212, 155 Eng. Reprint, 579 (1851).

[52] Webb *v.* Portland Mfg. Co., 3 Sumner, 189, Fed. Cas. No. 17, 322 (1838).

[53] Counsel (Bramwell and Beavan) use the name "riparian proprietor" as in common use; opposing counsel cites Story in Tyler *v.* Wilkinson, and both sides refer to other American cases.

[54] "There was a strong tendency on the part of some of the judges in earlier times to recognize a right to obtain title to water by prior appropriation or occupancy, and at one time it seemed as though that doctrine would be established." Note in 30 L. R. A. 665. "This doctrine was not established until comparatively modern times," etc. . . . "Appropriation of the water of flowing streams for purposes of utility has thus gradually changed from being considered a means of acquiring important water rights to being deemed of importance only as evidence of damage and a measure of damages to be recovered." GODDARD, EASEMENTS, 7 ed., 348.

[55] Miner *v.* Gilmour, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858).

We are therefore referred, by the English reports themselves, to these American jurists for the designation of the doctrine as a "riparian" one, and for the most approved expression of the doctrine, by the aid of which the English courts were enabled to lay contention at rest. The American usage arose through Story and Kent, both of whom at about the same time took the name and doctrine from the French civil law. This is far removed from the Year Books, to which it has been so often ascribed. If this presentation is correct, the common law of watercourses is not the ancient result of English law, but is a French doctrine (modern at that) received into English law only through the influence of two eminent American jurists.

The identity of the modern common law of watercourses with the civil law has been repeatedly acknowledged. Among writers the statement of Angell that the name "riparian proprietor" is taken from the civil law has already been noticed. "The owners of watercourses are denominated by the civilians *riparian* proprietors, and the use of the same significant and convenient term is now fully introduced into the common law."[56] Speaking of the civil law regarding the use of water, Mr. Yale says: "These rights do not, as has been seen, differ substantially, so far as private property is concerned, from the common law."[57] According to another writer, the common law of fishing is likewise based upon the civil law.[58] Washburn declared: "No lawyer need be told that many of the principles of the common law of Easements are derived directly from the civil law, and may be found in the Scotch and Continental systems of jurisprudence."[59]

Among jurists may be cited a well-known decision of Lord Kingsdown that the French law and the common law are not materially different.[60] In the Supreme Court of the United States we have recent testimony from Mr. Chief Justice White of the same nature.[61] And we have the same testimony in the

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[56] ANGELL ON WATERCOURSES, 6 ed., § 10.

[57] YALE, MINING CLAIMS AND WATER RIGHTS, 153.

[58] SCHULTES, AQUATIC RIGHTS, 1.

[59] WASHBURN ON EASEMENTS, 4 ed., xiii (preface to 1 ed.).

[60] Miner *v.* Gilmour, 12 Moore P. C. 156, 14 Eng. Reprint, 861 (1858).

[61] Cubbins *v.* Mississippi River Commission, 241 U. S. 351, 36 Sup. Ct. Rep. 671 (1916).

reports of the supreme courts of California,[62] Texas,[63] and Vermont,[64] among others.

The doctrine of the French code upon watercourses has spread similarly to the countries of Europe, South America, and even to Japan. The limits of this paper force it to be content with referring to others where that is more adequately set forth.[65]

III

The descent being indicated whereby the common law of watercourses comes to us from the French law, we may examine the doctrines of the French law with justifiable anticipation that they will have interest and profit for us in the investigation of the problems we are now meeting every day, in working under the same law of watercourses which they have, and which came to us from them.

The French system consists principally of the two Code sections already quoted, and the elaboration thereof by commentators. As so unfolded, its fundamental doctrines are: The use of a stream is confined primarily to riparian owners, that is, the owners of land contiguous to the flow of the water, excluding nonriparian owners or lands, and without preference because of priority of use, or penalty because of nonuse. The riparian owners have equal rights for reasonable use upon their riparian lands, what is a reasonable use being left to the discretion of the courts. Riparian land is defined as the land in contact with the stream, the test being applied as of the time of attempted use, so that if a change of boundary of the land occurs it affects the riparian land as follows: If the change is of the river boundary, by a permanent shift of the channel away from

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[62] Irwin *v.* Phillips, 5 Cal. 140 (1855); Lux *v.* Haggin, 69 Cal. 255, 334, 10 Pac. 674 (1886); Wholey *v.* Caldwell, 108 Cal. 95, 41 Pac. 31 (1895). On the argument in Lux *v.* Haggin, Mr. Hall McAllister read passages of the Spanish law from Eschriche, and the following colloquy occurred between him and Mr. Justice McKee: MCKEE, J.: "What is the difference between that and the common law?" MCALLISTER: "There does not seem to be any material difference so far as I can understand."

[63] "There is no material difference between the common law rule and that of the Roman and French law." Fleming *v.* Davis, 37 Tex. 173, 199 (1872). See also Rhodes *v.* Whitehead, 27 Tex. 304, 310 (1863).

[64] Tuthill *v.* Scott, 43 Vt. 525 (1871).

[65] Lobingier, "Napoleon and his Code," 32 HARV. L. REV. 114, 128; Wiel, "Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law," 6 CAL. L. REV. 245, 342. A copy of the latter paper may be had upon application to the Editor of CAL. L. REV., Berkeley, Cal.

the land (as by a sudden freshet), the former contact ceases to be of avail, as there remains no contact at time of attempted use. Similarly if a highway comes to be interposed along the river bank: If the change of boundary is on the exterior side of the land, by a shift inward, causing a contraction of area (as where an outer part of the tract is sold off), the parts cast out by the contraction cease, while so severed, to be riparian, since the parcels so detached cease to have contact with the stream at time of attempted use under such conditions. If the change of exterior boundary is by shift outward (as by a purchase of land next to the outer boundary), causing expansion of area, the united tract has contact with the stream, and the expanded area is all riparian while the union lasts. These fundamental civil law rules are subject to modification by grant, condemnation, or prescription.

In another place the present writer has set out and quoted the French authorities upon these principles at considerable length.[66] They are believed to be also the correct principles of the common law. The desire of the present paper is to carry the matter into other points not gone into in the previous paper.

1. A little discussion appears in the French commentators as to whether the riparian principles apply to small rivulets; but the distinction is discountenanced. "The law could not but condemn a distinction so little justified. Moreover most authors, notably Daviel and Championnière, have refused to admit a different legal status for rivulets than for rivers." [67]

In English and American law a distinction is stated, namely, that the common law distinguishes small streams in respect to domestic use. It is said that very small streams may be wholly consumed by an upper riparian owner where the water is taken only for such use.[68] But it is a point in some uncertainty. For

[66] 6 CAL. L. REV. 245, 342. A reprint thereof will be mailed on request to the Editor of the CAL. L. REV., University of California, Berkeley, California.

[67] "La jurisprudence ne pouvait donc que condamner une distinction si peu justifiée. Du reste, la plupart des auteurs, et notamment Daviel et Championnière, se sont refusés à admettre pour les ruisseaux une condition légale différente de celle des rivières." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 250. *Accord*, AUBRY ET RAU, 5 ed., 2, 47, 3, 80, note 1 ter.

[68] Miner *v.* Gilmour, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858); Attorney-General *v.* Great Eastern Ry. Co., 23 L. T. (N. S.) 344, affirmed in L. R. 6 Ch. 572 (1871); Lord Norbury *v.* Kitchin, 9 Jur. (N. S.) 132; 7 L. T. 685 (1863); Jones *v.* Tennessee, etc. Co., 80 So. (Ala.) 463 (1918); Lux *v.* Haggin, 69 Cal. 255, 395, 10 Pac. 674

example, although the rule as thus stated is a preference to physical position upon the upper stream course, it has been also construed as a preference not to position but to character of use, whereby a lower owner might entirely prevent an upper one from taking any water from a rivulet for any other than domestic purposes.[69] And even for domestic purposes it has been ruled that the whole may not be taken by the upper owner, but that there will be an apportionment among all.[70] This was in a jurisdiction where the right to take the whole of such a small flow has also been affirmed.[71]

This asserted common law distinction has its leading expression in an English case of 1858, where domestic uses are classified as "ordinary" and other uses as "extraordinary." [72] An eminent writer remarks that this distinction appears for the first time in this case.[73] In 1842 an American case had laid down the law in the same form as the English case, under the terms "natural uses" and "artificial uses"; [74] and of this case an American writer remarked: "A distinction of this sort was, for the first time it is believed, expressly laid down in a case before the Supreme Court of Illinois." [75] In an excellent Scotch book on the law of water in Scotland, quotation is made from a Scotch case of 1791,[76] where it was said: "There is a certain order of uses: the natural and primary uses are preferable to all others; these are drink for man and beast;" and commenting thereon, the author says that this "appears to afford the earliest instance of this terminology."[77] It appears to be a will-o'-the-wisp that is hard to put one's finger on, for we find somewhat simi-

(1886); Gutierrez *v.* Wege, 145 Cal. 733, 79 Pac. 449 (1905); Williams *v.* Wadsworth, 51 Conn. 277 (1883); Stratton *v.* Mt. Hermon Boys' School, 216 Mass. 83, 103 N. E. 87 (1913); Hough *v.* Porter, 51 Ore. 318, 98 Pac. 1083 (1909); *In re* Sucker Creek, 83 Ore. 228, 163 Pac. 430 (1917); Miller *v.* Miller, 9 Pa. St. 74 (1848); Slack *v.* March, 11 Phil. (Pa.) 543 (1875).

[69] See Williams *v.* Wadsworth, 51 Conn. 277 (1883); Evans *v.* Merriweather, 4 Ill. 492 (1842).

[70] Wiggins *v.* Muscupiabe, etc. Co., 113 Cal. 182, 45 Pac. 160 (1896).

[71] California cases, *supra*. Upon this general subject see article by Professor Jeremiah Smith in 17 COL. L. REV. 383, 398; also WIEL, WATER RIGHTS, 3 ed., § 740 *et seq.*

[72] Miner *v.* Gilmour, 12 Moore P. C. 131, 14 Eng. Reprint, 861 (1858).

[73] SALMOND, TORTS, 4 ed., 301.

[74] Evans *v.* Merriweather, 4 Ill. 492 (1842).

[75] ANGELL, WATERCOURSES, 7 ed., 206.

[76] Russell *v.* Haig, BELL'S DECISIONS, 338, 346; Morison, 12, 823 (1791).

[77] FERGUSON, LAW OF WATER IN SCOTLAND, 238.

lar expressions in the civil law writers of a century or so earlier.[78] Its origin as a common law rule seems as elusive as its actual meaning; and it is therefore of interest that the French writers seem to repudiate it, as do some expressions in this country also.[79]

2. Upon navigable rivers the English and American rulings recognize all riparian rights, but subject to the condition of not interfering with navigation.[80] In other words, the usual riparian law applies between riparian owners thereon as respects diversion and the like, so long as the state or some one claiming to be injured in navigation is not a party to the controversy, or so long as there is in fact no interference with navigation.[81]

The French writers say upon that matter: "Navigable or floatable rivers are excluded by the formal terms of article 644." A law of 1791 had read: "No one may set himself up as exclusive owner of the waters of a navigable or floatable river; consequently all riparian owners may, as of common right, make diversions of water therefrom, provided they do not turn or impair the flow in a way harmful to the general good and the customary navigation of such river." Of this the commentator remarks: "This derogation from the principles of the public domain having occasioned numerous abuses, the legislator of the year XII had to return to the rule of the older law."[82]

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[78] "Aqua profluens *ad lavandum et potandum unicuique jure naturali concessa*" (Vinnius, quoted in 5 Barn. & Adol. 1, 24, 110 Eng. Reprint, 692 (1833). Grotius says: "At idem flumen, qua aqua profluens vocatur, commune mansit, nimirum ut bibi hauririque possit." GROTIUS, lib. II, Cap. II, § XII.

[79] Wiggins *v.* Muscupiabe, etc. Co., 113 Cal. 182, 45 Pac. 160 (1896); Lux *v.* Haggin, 69 Cal. 255, 407–408, 10 Pac. 674 (1886); Meng *v.* Coffee, 67 Neb. 500, 93 N. W. 713 (1903). It is said of the distinction: "It seems never to have been acted on in any reported case," but adding that as *dictum* it may have a secure place in the law. SALMOND, TORTS, 4 ed., 301.

[80] Lyon *v.* Fishmongers Co., L. R. 1 A. C. 662, 673 (1876); Heilbron *v.* Fowler, etc. Co. 75 Cal. 426, 17 Pac. 535 (1888); and cases cited in WIEL, WATER RIGHTS, 3 ed., § 726.

[81] *Ibid.* See also Roanoke, etc. Co. *v.* Roanoke, etc. Co., 159 N. C. 393, 75 S. E. 29 (1912); York Haven, etc. Co. *v.* York Haven, etc. Co., 194 Fed. (Pa.) 255, 266 (1911), 201 Fed. 270 (1912); King *v.* Schaff, 204 S. W. (Tex. Civ. App.) 1039, 1042 (1918); United States *v.* Chandler, etc. Co., 229 U. S. 53, 33 Sup. Ct. Rep. 667 (1913); United States *v.* Cress, 243 U. S. 316, 37 Sup. Ct. Rep. 380 (1916). Compare State *ex rel.* Ham *v.* Sup. Ct., 70 Wash. 442, 126 Pac. 945 (1912); State *v.* Sturtevant, 76 Wash. 158, 135 Pac. 1035 (1913).

[82] "Les rivières navigables ou flottables sont exclués en termes formels par l'art. 644. La loi des 28 septembre–6 octobre, 1791, en disposait autrement, en son titre 1er, sec-

From this it appears that the riparian right is not recognized in navigable streams, and that may be the *formal* law; but it also appears that the law "*in practice*" does not follow the formal law to its full extent, for another commentator has it:

"Neither the riparian owner nor the public have any right to use the water of navigable or floatable stream for any purpose whatever. Nevertheless the government, and in less important cases the departmental administrations, may grant to riparian owners the right to take water from such streams, and they tolerate the public use of such water for certain domestic purposes, for washing, for watering animals, etc. These grants and permissions are always revocable, without recourse on the part of the beneficiaries." [83]

So far as logic is concerned, there seems no reason why the rule above stated as the common law rule is not fully consistent with public rights in navigable streams.

3. Natural lakes and ponds are outside the scope of the articles of the French Code establishing riparian rights, it is said. But when such lake or pond has an inlet or outlet in natural springs or streams there seem to arise differences of opinion.

"This article (644) is considered by the majority of writers as without possible application to a pond, which does not constitute a running watercourse. M. Dalloz, ingeniously enumerating the various supposable cases that may arise, demonstrates in all of them the emptiness of pretensions of the neighboring landowners to take the water of ponds. He distinguishes three cases: (1) the pond is fed by a spring and a watercourse formed thereby, which, taking rise before reaching the pond, traverse it for its length or width; in this case the owner of the pond is obliged to allow the water of the spring and the small watercourse to

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tion 1, art. 4: 'Nul ne peut se prétendre propriétaire exclusif des eaux d'un fleuve ou d'une rivière navigable ou flottable; en conséquence, tout propriétaire riverain peut, en vertu du droit commun, y faire des prises d'eau, sans néanmoins en détourner ou embarrasser le cours d'une manière nuisible au bien général et à la navigation établie.' Cette dérogation aux principes de la domanialité publique ayant engendré de nombreux abus, le législateur de l'an XII a dû revenir à la règle de l'ancien droit." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 348.

[83] "Les riverains ni le public n'ont aucun droit à user de l'eau des cours d'eau navigables ou flottables, pour quelque objet que ce soit. Néanmoins le gouvernement, et, dans le cas les moins importants, l'administration départementale peut concéder aux riverains le droit d'exercer des prises d'eau, et ils tolérent que le public use des eaux pour certains besoins domestiques, pour des lavoirs, abreuvoirs, etc. . . . Ces concessions et tolérances sont toujours revocables, sans réclamation possible de la part des bénéficiaires." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 431.

flow out of the pond, for these waters should enure to the benefit of the lands lower down and not to that of the lands bordering on the pond; (2) the pond is formed by springs which rise in its bed: as these springs belong to the owner of the pond, no one has the right to deprive him of the waters without his permission; (3) even in case of floods the landowners on a pond do not have the right to take water therefrom, since, if each riparian were to effect a diversion of water by trenches, where would be the security of the owner of the pond? But the riparian owners on a pond may by prescription acquire the right to take water therefrom." [84]

On the other hand, another commentator says: "The owner of the pond cannot turn the waters from their ordinary course at the outlet of the pond without exposing himself to an action by the riparian owners lower down." [85] And other commentators have expressed similarly divergent views.[86] In this connection a commentator of standing has remarked:

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[84] "L'art. 644, C. civ. sec. 1 pose en principe que toute personne dont la propriété borde une eau courante, autre que celle qui est déclarée dépendre du domaine public, peut s'en servir à son passage pour l'irrigation de ses propriétés. Cette article est considéré par la majorité des auteurs comme sans application possible aux étangs, qui ne constituent pas une eau courante. M. Dalloz (v° Eaux, n. 251), détaillant ingénieusement les diverses hypothèses qui peuvent se présenter, démontre dans toutes l'inanité des prétentions des voisins à puiser l'eau des étangs. Il distingue trois cas: 1° l'étang est entretenu par une source et un cours d'eau par elle formé, et qui, prenant naissance avant d'arriver à l'étang, le traversent dans sa longueur ou sa largeur: dans ce cas, le propriétaire de l'étang est obligé de laisser libre l'eau de la source et le cours du ruisseau à la sortie de l'étang, car ces eaux doivent profiter aux propriétés inférieures et non aux propriétés longeant l'étang; 2° l'étang est formé par des sources qui jaillissent dans son lit: comme ces sources appartiennent au propriétaire de l'étang, nul n'a le droit d'en dériver les eaux sans la permission de celui-ci; 3° même en cas de crues, il faut refuser aux voisins de l'étang le droit d'y prendre de l'eau, car, si chaque riverain opérait une dérivation par de saignées, où serait la garantie du propriétaire? Mais les riverains d'un étang peuvent, par prescription, acquérir le droit d'y exercer des prises d'eau." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 466–467.

[85] "Mais le propriétaire ne peut détourner les eaux de leurs cours normal, à la sortie de l'étang, sans s'exposer à une action des riverains d'aval." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 347–348. Likewise BAUDRY-LACANTINÉRIE ET CHAUVEAU, DES BIENS, 584, 585.

[86] "Les dispositions de ces articles sont donc étrangères aux eaux pluviales *quater*, et à celles des lacs, étangs ou réservoirs. Elles restent sans application aux eaux dérivées d'un étang, alors même qu'elles seraient conduites, au lieu où elles doivent être utilisées, par le lit d'une ancienne rivière ou qu'il s'y mêlerait des eaux provenant de ruisseaux supérieurs. Mais il en est autrement des cours d'eau naturels traversant des étangs qu'ils alimentent." 3 AUBRY ET RAU, DROIT CIVIL, 5 ed., 80. See BAUDRY-LACANTINÉRIE ET CHAUVEAU, DES BIENS, 559.

"One of our good authors, after having established this principle (that lakes and ponds are outside the riparian code section) adduces matters in derogation thereof which are another example of the deplorable uncertainty which prevails upon the doctrine. 'If,' says Proudhon, 'the pond is fed by spring waters which flow naturally and continuously, there is no reason to distinguish it from a running watercourse, and undoubtedly the neighboring landowners thereon may instal ditches.'"[87]

These questions are further discussed at length in the French books, and without doubt any one who has a problem in that line will find profit in consulting them.

In the common law authorities it is said in effect that a lake and its incoming or outletting stream should be considered as a unit, with like rights on every part of it,[88] and that riparian owners on the lake may take water therefrom as against each other as well as against riparian owners on the incoming or departing streams, and *vice versa*.[89]

4. "Underground waters are governed by article 552 of the French Civil Code. The proprietor of the surface is proprietor of what is beneath."[90] In repeating this, another commentator adds: "It results that the proprietor of a tract of land is proprietor of the waters originating therein, as he is of the soil, the sand, the stones which make up the land."[91] It is accordingly laid down by these and other commentators that no action lies against a landowner

[87] "Un de nos bons auteurs, après avoir établi ce principe, y apporte des dérogations qui sont un nouvel exemple de la déplorable incertitude qui règne dans la doctrine. 'Si,' dit Proudhon, 'l'étang est alimenté par des eaux de source qui se reproduisent naturellement et continuellement, il n'y aura plus de raison de la distinguer d'une eau courante, et bien *certainement* les voisins y pourront pratiquer des rigoles.'" 7 LAURENT, PRINCIPES DE DROIT CIVIL, 302.

[88] Duckworth *v.* Watsonville, etc. Co., 150 Cal. 520, 89 Pac. 338 (1907); *ibid.*, 158 Cal. 206, 110 Pac. 927 (1910).

[89] Turner *v.* James Canal Co., 155 Cal. 82, 99 Pac. 520 (1909). See King *v.* Chamberlin, 20 Idaho, 504, 118 Pac. 1099 (1911); Kennedy *v.* Niles, etc. Co., 173 Mich. 474, 139 N. W. 241 (1912); Ryan *v.* Quinlan, 45 Mont. 521, 124 Pac. 512 (1912); State *ex rel.* Ham *v.* Superior Ct., 70 Wash. 442, 126 Pac. 945 (1912); Hardin *v.* Jordan, 140 U. S. 371, 390, 11 Sup. Ct. Rep. 808 (1891); 2 HARV. L. REV. 196 and 316; 3 HARV. L. REV. 1.

[90] "Les eaux souterraines sont régies par l'article 552 du Code civil. Le propriétaire du dessus est propriétaire du dessous." 2 FABREGUETTES, TRAITÉ DES EAUX PUBLIQUES ET PRIVÉES, 235 (1911).

[91] "Il en résulte que le propriétaire d'un fonds est propriétaire des eaux qui y jaillissent, comme de la terre, du sable, des pierres, qui constituent le sol." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 400.

excavating in his land and thereby impairing the underground supply in other lands.

In announcing this as likewise the common law an English court remarked:

"The Roman law forms no rule, binding in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe." [92]

Nevertheless it is a rule that has not wholly stood the test of time either in France or England, and has been laid aside entirely in many states in America.

In France certain code sections particularly relating to the rule, namely, articles 641, 642, 643, were changed in 1898. As they had previously stood and as construed by the courts they had been held by most commentators to leave room for doubt whether they authorized destruction or diversion of springs if they were the source of a stream flowing to the lands of others below.[93] The new article 643 of 1898 provides: "If on leaving the land where they arise the waters of springs form a watercourse having the character of public and running waters, the proprietor cannot divert them from their natural course to the prejudice of lower users." [94]

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[92] Acton *v.* Blundell, 12 M. & W. 324, 353, 13 L. J. Ex. 289, 152 Eng. Reprint, 1223 (1843).

[93] "*Droit du propriétaire sur les sources qui émergent dans son fonds.* — Aux termes de l'art. 641 du Code civil, 'celui qui a une source dans son fonds peut en user à sa volonté, sauf le droit que le propriétaire inférieur peut avoir acquis par titre ou par prescription.' Ainsi le Code attribue au propriétaire du fonds où émerge une source un véritable droit de propriété sur cette source." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 112.

"Le propriétaire de la source conserve-t-il son droit absolu de propriété sur les eaux quand elles forment l'affluent d'une rivière? On lit dans un arrêt de la cour de cassation que le droit de disposition absolue des eaux reçoit exception 'au cas où les eaux ont été voluntairement abandonnées à la *communauté irrigative*' (c'est-à-dire aux propriétaires inférieurs qui s'en servent pour l'irrigation de leurs fonds); 'qu'elles prennent alors le caractère d'eaux publiques et courantes, et que la loi crée, en ce cas, des droits qui modifient ceux du propriétaire primordial' (Arrêt de rejet du 22 mai 1854 (Dalloz, 1854, 1, 301)). Cette même exception a été admise comme un principe par la cour de Rouen (Rouen, 17 juillet 1857 (Dalloz, 1857, 2, 181)). Il nous semble que la jurisprudence confond deux ordres d'idées tout à fait différents." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 213–214.

[94] "Si dès la sortie du fonds où elles surgissent les eaux de sourses forment un cours

It is said that the civil law has a further general exception where the interference with underground water (whether feeding a stream or not) is accompanied by malice in the interferer.[95] It is therefore interesting to note the following French statement:

"Many authors, notably Pardessus, have maintained, in reliance upon reasons of morality and public policy, that the courts ought to condemn enterprises whose sole object is to harm neighboring property and which amount thus to an abuse in exercising the right of property. This doctrine seems to us, as to Demolombe, against the text of the law; it would give rise, in its application, to inextricable difficulties and would necessitate a veritable inquisition into the motives and the intentions of the makers of excavations: the Court of Cassation has rejected it as applied to springs," etc.[96]

In England the first-mentioned modification (where the underground water affects a surface stream) has been asserted in some decisions,[97] and, although subsequently discouraged,[98] it is probably not wholly disposed of as a partial retreat from the original rule. The second modification (the malicious motive) has been more definitely rejected.[99]

In America the first-named modification (ground water affecting a stream) has been established,[100] and, further, the original rule

d'eau offrant le caractère d'eaux publiques et courantes, le propriétaire ne peut les détourner de leurs cours naturel au préjudice des usagers inférieurs." Art. 643, Code civil, nouveau. For a discussion of this new provision see 3 AUBRY ET RAU, 5 ed., 56 *et seq.* BAUDRY-LACANTINÉRIE ET CHAUVEAU, TRAITÉ DE DROIT CIVIL, DES BIENS, 581.

[95] Chasemore *v.* Richards, 7 H. L. Cas. 349, 383 (1859).

[96] "Plusieurs auteurs, notamment Pardessus (des Servitudes, n° 78) et Daviel (des Cours d'eau, tome III, n° 895), ont enseigné, en se fondant sur des raisons de morale et d'intérêt public, que les tribunaux devraient condamner les entreprises dont l'unique objet serait de nuire au fonds voisin et qui constitueraient ainsi un abus dans l'exercice du droit de propriété. Cette doctrine nous paraît, comme à Demolombe, contraire aux textes; elle soulèverait dans l'application des difficultés inextricables et nécessiterait une véritable inquisition sur les motifs et les intentions de l'auteur des fouilles; la Cour de cassation l'a repoussée pour les sources, ainsi que nous le verrons plus loin." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 77.

[97] Grand Junction, etc. Co. *v.* Shugar, L. R. 6 C. A. 483 (1871); Dudden *v.* Clutton Union, 1 H. & N. 627, 156 Eng. Reprint, 1353 (1857); Dickinson *v.* Grand Junction Co., 7 Exch. 282, 155 Eng. Reprint, 953 (1852).

[98] English *v.* Metropolitan, etc. Board, [1907] 1 K. B. 588, 601; Chasemore *v.* Richards, 7 H. L. 349, 11 Eng. Reprint, 140 (1859).

[99] Bradford Corporation *v.* Pickles, [1895] A. C. 587.

[100] Chauvet *v.* Hill, 93 Cal. 407, 408, 28 Pac. 1066 (1892); Gutierrez *v.* Wege, 145 Cal. 730, 734, 79 Pac. 449 (1905); McClintock *v.* Hudson, 141 Cal. 275, 281, 74 Pac.

is now generally discarded as a whole. The American cases now usually limit each landowner, as against his neighbor, to acts done in the reasonable use of his own land, and not for use elsewhere, nor even for a use on his own land that is not, in the discretion of the court, reasonable under the circumstances presented.[101] The general proposition that malice or motive is not a subject of legal inquiry is usually maintained, however.[102]

5. Public lands and the waters thereon have always figured largely in our western water law. A large portion of that law has been devoted to diversions of water from public lands, the United States having with respect thereto recognized the right of the prior appropriator by the Act of Congress of 1866.[103] The riparian rights in the French law are likewise not applied upon streams that are "appurtenances of the public domain." [104]

Another French code section has a unique analogy in California decisions concerning the water rights of the city of Los Angeles. The French section gave preferential rights, against private riparian owners, to a commune, village, or hamlet through which the stream might flow.[105] In California, after much litigation, the city of Los Angeles as successor of the Mexican Pueblo de los Angeles has been held to have succeeded to a public water supply from the Los Angeles River which runs through the city, and to have a right to the whole river as against private riparian owners thereon.[106] This result was reached after an examination of Mexican and Spanish law, without

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849 (1903); Cohen *v.* La Canada W. Co., 142 Cal. 437, 439–440, 76 Pac. 47 (1904); *In re* German, etc. Co., 56 Colo. 252, 139 Pac. 2 (1914); Bastian *v.* Nebeker, 49 Utah, 390, 163 Pac. 1092 (1917); and other cases in WIEL, WATER RIGHTS, 3 ed., § 1082.

[101] Ballantine & Sons *v.* Public Service Corp., 86 N. J. L. 331, 91 Atl. 95 (1914); Cason *v.* Florida Power Co., 74 Fla. 1, 76 So. 535 (1917); Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (1913); and other authorities in WIEL, WATER RIGHTS, 3 ed., §§ 1063, 1066.

[102] Compare Katz *v.* Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766 (1903), and Union Labor Hospital *v.* Vance Redwood Lumber Co., 158 Cal. 551, 555, 112 Pac. 886 (1910). See Dunshee *v.* Standard Oil Co., 152 Iowa, 618, 132 N. W. 371 (1911).

[103] 14 STAT. AT L. 253, 254, c. 262, § 4 of A. C. July 26, 1866; U. S. COMP. STATS. 1901, p. 1437; REV. STATS. § 2339; also § 17 of A. C. July 9, 1870, 16 STAT. 218; U. S. COMP. STAT. 1901, p. 1437; REV. STATS. § 2340. See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., Parts I, II; 1 CAL. L. REV. 11.

[104] Code Napoléon, Article 644.

[105] Code civil, § 643. By amendment in 1898 the provision in this regard was somewhat changed and transferred to § 642.

[106] WIEL, WATER RIGHTS, 3 ed., § 68.

mention of French law. It is an exception to the prevailing common law doctrine that a city as such is not a riparian owner, but only its lot owners who front on the stream.[107] So far as it comes from Mexican law in the case of Los Angeles, it seems to be public land law (which is the reason for mentioning it here).[108] It is placed in the judicial opinions in the Los Angeles cases, however, upon a special power resting in pueblos by general law (similar to the provision in the French code).

The Los Angeles cases enforce the "pueblo right" to the extent of enjoining landowners in the upper San Fernando Valley from using wells so far as the wells prevent underground water from seeping to the headwaters of the river.[109] This goes further than the French authorities indicated in the following passage. Speaking of the code section forbidding the owner of a spring from changing the course of a stream flowing therefrom, when the latter supplies the inhabitants of a commune, village, or hamlet, the commentator says:

"Incorporated into the law for the purpose of dealing with surface springs, it cannot be extended to underground waters. This extension, besides, would have consequences of exceptional gravity, since it would allow opposition to all excavations that might cut veins of water, and would tie up property with a kind of interdict. Therefore the decisions of the Court of Cassation have never hesitated to recognize that the communes cannot, in invoking article 643, interpose obstacles to the exercise of the upper proprietor's right to excavate even when his operations would have the effect of changing the course of underground waters." [110]

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[107] FARNHAM, WATERS AND WATER RIGHTS, 603, 609–612; 40 Cyc. 764–765; 37 L. R. A. (N. S.) 312, note. A case of note is City of Emporia *v.* Soden, 25 Kan. 588 (1881), by Mr. Justice Brewer, later of the United States Supreme Court.

[108] See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 68.

[109] Los Angeles *v.* Hunter, 156 Cal. 603, 105 Pac. 755 (1909).

[110] "Aux termes de l'art. 643 du Code civil, 'le propriétaire de la source ne peut en changer le cours, lorsqu'il fournit aux habitants d'une commune, village ou hameau, l'eau qui leur est nécessaire.' De même que toutes les exceptions au droit commun, cette disposition prohibitive doit être restreinte à l'objet précis pour lequel elle a été édictée. Inscrite dans la loi pour les sources extérieures, elle ne peut être étendue arbitrairement aux eaux souterraines. Cette extension aurait du reste des conséquences d'une gravité exceptionnelle, puisqu'elle permettrait de s'opposer à toutes les fouilles susceptibles de couper les veines d'eaux et frapperait la propriété d'une sorte d'interdit. Aussi la doctrine et la jurisprudence de la Cour de cassation n'ont-elles jamais hésité à reconnaître que les communes ne pouvaient, en invoquant l'art. 643, porter obstacle

6. Easements for dams on riparian lands of others, and rights of way to conduct water therefrom to the place of use, are governed in many respects by two French statutes, one enacted in 1845 and the other in 1847, which are always found discussed in connection with the code sections. "Subsequent to the Civil Code, two laws, one under date of April 29, 1845, and the other of July 11, 1847, have imposed upon properties three new obligations in favor of agriculture by giving very great facilities to irrigation. These three obligations are ordinarily classed as servitudes. They are servitudes of support [for dams], of [right of way for] aqueducts, and of discharge of waters after irrigation. These new provisions have not otherwise produced any modification of the rules laid down by the Code concerning the ownership and use of waters; nor have they affected the laws which have for their object the policing of waters." [111]

The riparian owner on whose land servitude of supporting a dam is thus imposed is entitled to compensation, as is also every landowner over whose land the conduit therefrom is built. The statutes are therefore founded upon the principle of condemnation with compensation.

They apply only to irrigation, and not to industrial works or

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au droit de fouille du propriétaire supérieur, alors même que les travaux avaient pour effet de modifier le cours des eaux souterraines. (C. C. civ., 29 novembre 1830, commune de Fagon *c.* Masse; —— req. 15 janvier 1833; commune de Fayence *c.* Dubourguet; —— civ., 26 juillet 1836 ville d'Apt *c.* Pin; —— civ., 4 décembre 1849, Mercader *c.* Couder et Lacvivier; —— civ., 28 mai 1872, ville de Toulon et commune du Revest *c.* Ciedu Ragas)." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 80, 81.

[111] "Postérieurement au Code civil, deux lois en date l'une du 29 avril 1845, l'autre du 11 juillet 1847, sont venues mettre à la charge des propriétés trois nouvelles obligations en vue de favoriser l'agriculture par des facilités plus grandes données à l'irrigation; ces trois obligations sont ordinairement qualifiées de servitudes: ce sont les servitudes d'appui, d'aqueduc et d'écoulement des eaux d'irrigation. Ces dispositions nouvelles n'ont d'ailleurs apporté aucune dérogation aux règles tracées par le Code sur la propriété et l'usage des eaux; elles n'ont pas davantage touché aux lois qui ont pour objet la police des eaux (art. 5, L. 29 avril 1845; art. 4, L. 11 juill. 1847)." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 457.

"Quant aux discussions longues et laborieuses, qui ont précédé le vote de la loi (of 1845), soit à la Chambre des députés, soit à la Chambre des pairs, elles n'établissent pas que le législateur ait entendu modifier les règles du Code civil ou en fixer l'interprétation, dans le sens de l'extension des droits d'usage aux propriétés non riveraines. La plupart des orateurs et specialement les deux rapporteurs, MM. Dalloz et Passy, ont affirmé à diverses reprises que ces régles demeuraient intactes et qu'il n'y était dérogé ni directement ni indirectement." 1 PICARD, TRAITÉ DES EAUX, 2 ed., 361; 3 AUBRY ET RAU, 5 ed., 35, 36, *accord.*

water power.[112] The extent of the irrigation, whether a garden or a farm, by urrows or by flooding, is not a factor. The granting or refusing of an application for permit to exercise the servitude is not of right, but is discretionary with the tribunals hearing the petition, in the exercise of which discretion they consider among other things the balance of injury and benefit. The compensation to be awarded includes among other elements the damage expected to result from occupation of the land needed, and from the exercise of the servitude of access to the ditch or dam for the purpose of maintaining and repairing it, but not speculative damages based upon future considerations that cannot be reduced to a reasonable certainty.[113] Parks and enclosures about dwellings are excluded from the law of 1845 relative to rights of way, but are not exempted from the law of 1847 relative to building dams.[114] The statutes apply to facilitating riparian uses as well as nonriparian uses;[115] and under them a riparian owner may build a dam beyond the middle of the stream on the land of an opposite riparian owner, or may bring his water from a point above his boundary line.[116] Some further information regarding these statutes has been noted by the present writer in another place.[117]

This matter of obtaining access to streams over lands of another has been a source of considerable contention in this country. In early California a statute giving miners a right of entry on private land of agriculturists was held unconstitutional. On the other

[112] 1 PICARD, TRAITÉ DES EAUX, 2 ed., 377–379. See Water Supply Paper 238 of the United States Geological Survey, concerning efforts to get legislation extending these acts to water power uses.

[113] 1 PICARD, TRAITÉ DES EAUX, 2 ed., 377–379.

"Cette servitude d'appui n'existe que pour les besoins de l'irrigation; elle ne peut être exercée qu'autant que les besoins sont sérieux, et qu'elle ne causera pas un trop grand préjudice aux propriétés voisines. Par suite, lorsque les tribunaux sont saisis d'une demande tendant à obtenir l'exercice de la servitude au cas de désaccord entre le riverain désireux d'appuyer un barrage et le riverain opposé, ils ont un pouvoir d'appréciation absolu et ne sont nullement astreints par la disposition de la loi du 11 juillet 1847 de reconnaître au demandeur le droit de servitude qu'il prétend exercer. Aubry et Rau, t. 3, sec. 241, texte et note 25; Demolombe, t. 11, n. 228; Ballot, loc. cit. — Bien entendu, elle ne peut être réclamée que moyennant le paiement d'une juste et préalable indemnité. Mais il n'existe aucune limitation en raison du mode d'irrigation employé." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 457.

[114] *Ibid.*

[115] *Ibid.*, 384.

[116] *Ibid.*

[117] WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., § 614.

hand in early Colorado, followed in a number of other Western states, decisions allowed such entry for dam and ditch-building without compensation and without even an enabling statute. The California stand has been maintained, so far as the water is sought for private use as distinguished from public distribution. The Colorado position has been maintained only so far as statutes have since been enacted for it upon the basis of condemnation with compensation; not, however, confined to public distribution projects, as in California, but extending also to private enterprises (such as water for the irrigation of one's private farm), as in France, and extending (beyond the French acts) to other purposes, such as mining, lumbering, etc.[118] In view of the similarity to the French system, the experience under the French statutes would seem to offer considerable interest where these questions arise in this country.

7. Public administration is extensively treated in the French books. It seems to be confined to the ordinary administrative officers, with only occasionally a special office for water matters. In a number of American states water commissions have been created to pass upon permits for water uses, the erection of dams and canals, and general supervision.[119]

The scope of the French administrative activity will be indicated by extracting the following three articles from a set based upon a "model" or form of general regulations of the year 1878:

"Art. 4.—Every proprietor who wishes to undertake construction upon a watercourse or adjacent thereto must submit to the prefect the plans which he proposes to adopt. Within two months following the filing of this communication, the prefect, after having taken advice of engineers, will make known to the petitioner whether the proposed works appear

[118] Upon this matter see WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 221–226; 607–614; and compare the following among decisions more recent: Inspiration, etc. Co. *v.* New Keystone, etc. Co., 16 Ariz. 257, 144 Pac. 277 (1914); Gravelly Ford, etc. Co. *v.* Pope & Talbot Land Co., 36 Cal. App. 556, 178 Pac. 150 (1918); *Ibid.*, 36 Cal. App. 717, 178 Pac. 155 (1918); CAL. CONST. Art. XII, § 23; CAL. STAT. 1911, chap. 719; CAL. STAT. 1913, p. 1012, § 12; City of Albuquerque *v.* Garcia, 17 N. Mex. 445, 130 Pac. 118 (1913); Stettler *v.* O'Hara, 69 Ore. 519, 139 Pac. 743 (1914); Tanner *v.* Beers, 49 Utah, 536, 165 Pac. 465 (1917); Monettaire, etc. Co. *v.* Columbus, etc. Co., 174 Pac. (Utah) 172 (1918); Irwin *v.* J. K. Lumber Co., 102 Wash. 99, 172 Pac. 911 (1918); Grover, etc. Land Co. *v.* Lovella Ditch, etc. Co., 21 Wyo. 204, 131 Pac. 43 (1913); Union Lime Co. *v.* Chicago, etc. Co., 233 U. S. 211, 34 Sup. Ct. Rep. 522 (1914).

[119] See WIEL, WATER RIGHTS, 3 ed., chaps. 49, 50.

likely to impair the free flow of the waters, and whether, as a consequence, the administration is opposed to their execution. After waiting this period, if he has received no reply, the petitioner may proceed, without prejudice, however, to the rights of third persons and the rights of the Administration.

Art. 5.—No dam, no foundation, no permanent or temporary work of a nature to change the régime of the waters may be established or reconstructed upon a watercourse without the authorization of the prefect.

Art. 6.—It is forbidden to use cuts in the banks or other means of diversion without having obtained the authorization of the prefect."

Thus permission in advance is required for takings of water for industrial, agricultural, and for all works to be established in the bed of streams.[120]

It is held that the necessity of securing a permit applies to works of riparian owners as well as others. Attention in this regard is called by the commentators to section 645 of the Civil Code, which requires the courts to respect local rules. Administration regulations are considered to be local rules within this provision.[121] Works

[120] "Art. 4. — 'Tout propriétaire, qui veut opérer une construction au-dessus des cours d'eau ou les joignant, doit soumettre au préfet les dispositions qu'il se propose d'adopter. Dans les deux mois qui suivront le dépôt de cette communication, le préfet, après avoir pris l'avis des ingénieurs, fera connaître au pétitionnaire si les ouvrages projetés paraissent devoir nuire au libre écoulement des eaux, et si, en conséquence, l'Administration s'oppose à leur exécution. Après ce délai, s'il n'a reçu aucune réponse, le pétitionnaire pourra passer outre, sans préjudice toutefois des droits des tiers et de ceux de l'Administration.'

"Art. 5. — 'Aucun barrage, aucune plantation, aucun ouvrage permanent ou temporaire de nature à modifier le régime des eaux ne peut être établi ou réparé sur un cours d'eau sans l'autorisation du préfet.'

"Art. 6. — 'Il est interdit de pratiquer dans les berges des coupures et autres moyens de dérivation sans avoir obtenu l'autorisation du préfet.'

"Ainsi les prises d'eau industrielles ou agricoles et tous les ouvrages à établir dans le lit des cours d'eau nécessitent une permission préalable. Pour les ouvrages supérieurs, l'Administration se contente d'exiger une communication qui la mette à même d'exercer son droit de veto." 2 PICARD, TRAITÉ DES EAUX, 2 ed., 27, 28.

[121] "La seule difficulté est de savoir s'il faut au riverain une autorisation de l'administration. Il a été jugé que le riverain ne peut, alors même qu'il est propriétaire des deux rives, construire un barrage sans autorisation. Dans l'espèce, il y avait un règlement local (Arrêt de cassation de la chambre criminelle du 15 novembre 1838 (Dalloz, au mot Eaux, n° 581, 3°)), et l'article 645 veut que les règlements locaux soient observés." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 339.

"Les riverains ont-ils besoin d'une autorisation pour faire soit des travaux de défense, soit des ouvrages destinés à faciliter l'usage des eaux? S'il y a un règlement qui prescrit l'intervention de l'administration, il va sans dire que les riverains doivent l'observer, car la loi fait un devoir aux tribunaux d'en assurer l'exécution (art. 645).

constructed by riparians without permission may be ordered suppressed.[122]

The regulative power does not extend to granting concessions to nonriparian appropriators so as to be valid against riparian owners; the latter may always have recourse to the courts against the administrative action. One French minister of public works declared that he had never attempted to make any such concessions against riparian rights, and a law proposing to give him such power was rejected and never got passed.[123] The actions of the administrative officers are always subject to vested rights, the commentators agree, and an infringement of them may still be judicially redressed.[124] "The general regulations never have the effect of cutting off private claims to rights of use, so far as their provisions allow such rights to exist. The users remain free to submit these claims to judicial determination."[125] The same ruling is made in

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Même en l'absence de règlement, on décide, en France, qu'aucun barrage ne peut être établi sans une autorisation préalable, et cette jurisprudence a été sanctionnée par le décret du 25 mars 1852 (Demolombe, t. XI, p. 214 n° 272, et les autorités qu'il cite. Il faut ajouter un arrêt de rejet du 11 mai 1868 (Dalloz, 1868, 1, 468)). En Belgique, un arrêté royal du 28 août 1820 a décidé la question dans le même sens." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 351.

[122] "Il arrive souvent que des travaux sont exécutés par les riverains sans l'autorisation de l'autorité administrative: l'administration reste toujours libre d'ordonner la suppression de ces travaux sans indemnité." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 417–418.

But the same author intimates that this is the rule only where a regulation against unauthorized work has been specially made. "L'exécution de travaux sans autorisation ne constitue pas à elle seule une contravention; pour que le fait soit susceptible de répression, il faut, en outre, qu'un règlement soit venu défendre toute construction non autoriséé." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 418.

[123] 3 AUBRY ET RAU, 4 ed., 19, note 22.

[124] "Les mesures individuelles prises par l'administration doivent respecter les droits acquis; les actes administratifs contiennent en général toutes réserves à cet égard. Si le règlement d'eau porte atteinte aux droits d'usage conférés par l'art. 644 ou acquis par titre ou prescription, les particuliers lésés sont en droit de se pourvoir devant l'autorité judiciaire." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 417.

"Or, la loi n'accorde qu'aux riverains le droit de se servir des eaux; l'administration ne peut pas étendre ce droit aux non-riverains. Elle enlèverait par là aux riverains le volume d'eau qu'elle concéderait à un non-riverain; ce serait, en un certain sens, une expropriation sans indemnité et dans un intérêt particulier; ce qui serait en définitive une violation de la propriété." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 328.

[125] "Les règlements généraux n'ont jamais pour effet de trancher les contestations d'intérêt privé sur les droits d'usage, tels que leurs dispositions les laissent subsister. Les usagers demeurent libres de soumettre ces contestations à l'autorité judiciaire." 2 PICARD, TRAITÉ DES EAUX, 2 ed., 79.

America with respect to water commissions.[126] There is thus a mingling of administrative and judicial authority in water matters, which one French commentator refers to as "unique under our law." [127]

The administrative permit is thus no defense to a judicial action to abate the permitted act at the suit of the owner of a vested right infringed by it. But it seems that damages against the permittee will not be granted,[128] unless he has broken the regulations.[129] *Query*, whether there is such distinction between injunction and damages in this respect in American law.[130]

The permits are revocable by the administrative authority grant-

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[126] WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 410, 411, 1192–1194, 1211. See also subsequently Youngs *v.* Regan, 20 Idaho, 275, 118 Pac. 499 (1911); King *v.* Chamberlin, 20 Idaho, 504, 118 Pac. 1099 (1911); Gard *v.* Thompson, 21 Idaho, 485, 123 Pac. 497 (1912); Marshall *v.* Niagara, etc. Co., 22 Idaho, 144, 125 Pac. 208 (1912); Washington State Sugar Co. *v.* Goodrich, 27 Idaho, 26, 147 Pac. 1073 (1915); Gearhart *v.* Frenchman, etc. Irr. Dist., 97 Neb. 764, 151 N. W. 323 (1915); Knox *v.* Kearney, 37 Nev. 393, 142 Pac. 526 (1914); Owens *v.* Snider, 52 Okla. 772, 153 Pac. 833 (1915); Gay *v.* Hicks, 33 Okla. 675, 124 Pac. 1077 (1912); Pringle Falls, etc. Co. *v.* Patterson, 65 Ore. 474, 128 Pac. 820, 132 Pac. 527 (1912); St. Germain, etc. Co. *v.* Hawthorne Ditch Co., 32 S. Dak. 260, 143 N. W. 124 (1913); Chandler *v.* Utah, etc. Co., 43 Utah, 479, 135 Pac. 106 (1913); Peterson *v.* Eureka, etc. Co., 176 Pac. (Utah) 729 (1918).

[127] ". . . nous rencontrerons même certaines difficultés de droit dans lesquelles s'exerce concurremment la juridiction de l'une et de l'autre autorité, circonstance peut-être unique dans notre droit." 5 LABORI, RÉPERTOIRE DU DROIT FRANCAIS, 400.

"Du pouvoir qui appartient à l'administration de fixer la hauteur à laquelle doivent être tenues les eaux des moulins et usines on a parfois conclu que, dans certains cas, les tribunaux devaient se refuser à statuer, et renvoyer les parties devant l'autorité administrative; Cass. 28 dec. 1830 (S. 31.1.44) — Ce point de vue n'a pas paru exact; on a fait remarquer, en effet, que les tribunaux ne devaient surseoir à statuer qu'autant qu'une question de police des eaux était soulevée, et qu'ils devaient statuer dans toute autre hypothèse: Cass. 5 mars 1833 (S. 33.1.479) — Aubry et Rau, loc. cit." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 418.

[128] ". . . les riverains, auxquels la réglementation nouvelle porte un préjudice, ne sauraient réclamer aucune réparation de ceux qui l'ont causé par leur obéissance aux prescriptions de l'autorité compétente." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 417.

[129] "Toutefois l'observation des règlements ne peut, en aucun cas, donner lieu à une action de la part des tiers, alors même que ceux-ci seraient atteints dans leur jouissance antérieure et subiraient un préjudice: nul n'est tenu à une réparation pour avoir obéi à la loi. Inversement, les contraventions aux règlements peuvent servir de base à une action en réparation du dommage qui en résulterait pour les tiers." 2 PICARD, TRAITÉ DES EAUX, 2 ed., 79.

[130] See authorities *supra*, note 123. Compare Cason *v.* Florida Power Co., 76 So. (Fla.) 535 (1917).

ing them, and without compensation.[131] In America, the revocability has been a subject of contention for some years.[132]

Comparison of these and of many similar matters as discussed in the French books with the rules and regulations of our water boards and commissions and of the federal departments having to do with reservoirs and canals built upon public lands or upon navigable rivers will suggest many points of common interest.

8. In the same connection, our public-service commissions have taken over the regulation of charges and conditions of distribution of water by distributors to their consumers, which step (unless recently) has apparently not yet been definitely taken in France. The companies are required to publish their charges and regulations, but it seems to be still treated as arguable whether these rates and regulations can be publicly controlled, and whether they need necessarily be followed.

As indicating public control the following statement is quoted from Labori:

"The waters of irrigation canals are considered, with their laterals, as 'res nullius,' whose use is reserved to all, and which for that reason are insusceptible of private appropriation. Consequently, while the bed of an irrigation canal or ditch may be the subject of a private property right, it is otherwise with the water which fills it; the agreements of the parties cannot prevail against the declared policy of the public authority which has distributed this water with a view to the common interest." [133]

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[131] "La concession règle l'exercice d'un droit préexistant; elle n'en confère aucun au concessionnaire. Il est certain que celui-ci ne peut pas s'en prévaloir comme d'un droit acquis à l'égard de l'administration; l'autorité administrative intervient toujours dans un intérêt public, et l'on ne peut jamais opposer un droit, pour mieux dire un intérêt privé à l'intérêt public; bien moins encore peut-on fonder un droit sur un acte administratif. Les autorités qui agissent dans l'intérêt public, le pouvoir exécutif aussi bien que le pouvoir législatif, peuvent toujours revenir sur ce qu'elles ont fait, en abrogeant leurs actes ou en les modifiant; il n'y a pas de droit acquis contre l'État. De là le principe que les concessions en matière de cours d'eau sont essentiellement révocables, et la révocation se fait, comme nous l'avons déjà dit, sans que le concessionnaire ait droit à une indemnité, du moins en vertu de la concession. S'il a des droits préexistants contre un co-riverain, il peut les faire valoir en justice (Ordonnance du conseil d'État du 18 novembre 1842 (Dalloz, au mot *Eaux* n° 470, 1°)). Car il résulte encore de la nature des concessions qu'elles ne sauraient donner ni enlever un droit." 7 LAURENT, PRINCIPES DE DROIT CIVIL, 394–395.

[132] See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., §§ 432, 434, 437.

[133] "Les eaux des canaux d'irrigation sont considérées avec leurs ramifications, comme des 'res nullius,' dont l'usage est réservé à tous, et qui, à ce titre, sont insusceptibles d'appropriation privée. Si par suite le lit des canaux ou fossés d'irrigation peut

On the other hand, against public regulation of the distribution of irrigation water, another commentator says:

"Irrigation canals are not part of the public domain. The definition of this domain by article 538 of the Civil Code: 'the portions of French territory which are not susceptible of private property,' does not apply to these canals; for an irrigation canal may perfectly well belong to an individual. Their use is never public. Without doubt, the large canals are established in the general interest of the region which they serve. But there is no right for every one, nor even for all of the riparians, to use them free or to take water from them at will; it is only by virtue of private contracts that certain proprietors make use of them to irrigate their lands. The character of private property of these canals has been recognized several times in judicial decisions." [134]

The same writer (the date of the work is 1896) discussed the matter further in the same vein. The schedule of rules and charges of irrigation canals, he says, requires contracts of service to conform to a pattern prescribed by the administration; but departure therefrom is allowed. The contract, and not the schedule of rates, governs. This has not been adjudged by the Council of State or by the Court of Cassation, but follows from the principle of freedom of contract. Where it does not exist, as in railways, owing to special legislation nullifying individual contracts, the latter are enenforceable in all provisions not contrary to the public order. The contract of service, and not the schedule of rates, is looked to by the courts in suits between the canal owners and the irrigators.[135]

être l'objet d'un droit de propriété privée, il en est autrement de l'eau qui le remplit; les conventions passées entre les parties ne sauraient prévaloir contre la destination de l'autorité publique qui a distribué cette eau au mieux des intérêts communs: Paris, 8 mars 1887 (D. 88. 2. 247)." 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS, 459.

[134] "Les canaux d'irrigation ne font pas partie du domaine public. La définition donnée de ce domaine par l'article 538 du Code civil: 'les portions du territoire français qui ne sont pas susceptibles de propriété privée,' ne s'applique pas à ces canaux; car un canal d'irrigation peut parfaitement appartenir à un particulier. Leur usage n'est jamais public. Sans doute, les grands canaux sont établis dans l'intérêt général de la contrée qu'ils desservent. Mais il n'appartient pas à tout le monde, ni même à tous les riverains, d'en user librement et d'y puiser de l'eau à volonté; *c'est seulement en vertu de contrats privés*, que certains propriétaires s'en servent pour irriguer leurs terres. Le caractère de propriété privée de ces canaux a été reconnu à diverses reprises par la jurisprudence (C. C., civ. 1er avril 1884, Compagnie générale des canaux et des travaux publics *c.* l'Administration de l'Enregistrement)." 4 PICARD, TRAITÉ DES EAUX, 2 ed., 27, 28. This author is Inspecteur Général des Ponts et Chaussées, Président de la section des Travaux Publics, de l'Agriculture, du Commerce et de l'Industrie au Conseil d'État.

[135] 4 PICARD, TRAITÉ DES EAUX, 2 ed., 54, 55.

This subject has been much debated in the irrigation cases in America, and of recent years the voidability of private contracts has come to be generally acknowledged, wherever they conflict with public rulings or with the requirement of equal service upon equal terms and at reasonable rates and subject to reasonable regulations. The present writer has not read sufficiently upon this matter in the more recent French writers to say whether the passage represents the present French point of view. It is quoted here to show that the form of contention is identical with the stand taken in American irrigation cases until the recent acceptance of the public service doctrines.[136]

In conclusion, it is hoped that among those specially interested in the subject of waters this paper may stimulate a little curiosity to see what else these sources of information contain.[137]

If they disclose a different system than ours, casual attention satisfying curiosity would be as much as they merited. But if found to be the system which we have, only more completely worked out than with us, they seem to offer practical value of marked extent; an available fund of information which can bring considerable light to a region of private law where there has been much groping and puzzling. It cannot, of course, be authority, nor would I wish it to be. I question the advisability of creating foreign authority even over public affairs in excess of judicial requirements. But the French learning can advance our knowledge upon this subject to-day without being authority, as it did when our law went to it for the fundamental principles in the beginning.[138]

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[136] See WIEL, WATER RIGHTS IN THE WESTERN STATES, 3 ed., chap. 56.

[137] The following French books are recommended. They are in the larger law libraries, and copies can be bought from N. A. Phemister Co., 42 Broadway, New York. Their main shortcoming is the uniform lack of proper indexing in French law books.

PARDESSUS, TRAITÉ DES SERVITUDES; DAVIEL, TRAITÉ DE LA LÉGISLATION ET DE LA PRATIQUE DES COURS D'EAU (1845); DEMOLOMBE, TRAITÉ DES SERVITUDES; PICARD, TRAITÉ DES EAUX, 2 ed. (1896); BOULÉ ET LESCUYER, CODE DES COURS D'EAU, 2 ed. (1900); FABREGUETTES, TRAITÉ DES EAUX (1911); 3 AUBRY ET RAU, DROIT CIVIL FRANÇAIS, 5 ed., 5 LABORI, RÉPERTOIRE DU DROIT FRANÇAIS; 7 LAURENT, PRINCIPES DE DROIT CIVIL; BAUDRY-LACANTINÉRIE ET CHAUVEAU, TRAITÉ DE DROIT CIVIL, DES BIENS, 3 ed. (1905).

[138] Acknowledgment is made to Mr. Richard C. Harrison, San Francisco, for assistance in translating the French passages herein quoted.